IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 103 of 2006

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NOBLE DEHYDRATES - Petitioner(s)
Versus
OCEANIC FOODS PVT. LTD. - Respondent(s)

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Appearance :
MR HARDIK C RAWAL for Petitioner(s) : 1,MRS MH RAWAL for Petitioner(s) : 1,
MR PREMAL S RACHH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 06/02/2007

ORAL JUDGMENT

1. This Company Petition has been filed by the petitioner – Noble Dehydrates for an appropriate order of winding up of the respondent company – Oceanic Foods Private Limited under the

provisions of the Companies Act; 1956.

2. It is the contention on behalf of the petitioner that the petitioner supplied 1300 kgs dehydrated tomato flakes by invoice dated 31.3.2006 worth Rs.1,10,500/- to the respondent company and the aforesaid goods were received and consumed by the respondent company without any complaint but the payment was not made. It is further submitted that after several telephonic attempts as the payment was not made, a statutory notice under Section 434 of the Companies Act came to be served upon the respondent company i.e. on 22.5.2006. It is the case on behalf of the petitioner that the false and fabricated reply dated 25.5.2006 was received on 1.6.2006. That the petitioner received letter dated 24.4.2006 and the debit note dated 25.4.2006 for the first time along with the aforesaid reply. It is submitted that concocted story of the respondent was falsified from the fact that the petitioner supplied tomato flakes whereas the documents at Annexure – D & E referred to Tomato Powder. It

is submitted that as a counterblast the respondent also issued one more legal notice dated 1.6.2006 for damages and for supply of other goods which the petitioner replied. It is submitted that as company is indebted to the petitioner for a principal sum of Rs.1,10,500/- along with interest accrued thereon and as the said amount is not paid, the said company is unable to pay its debts and is otherwise commercially insolvent and incapable of paying its debts and therefore, it is requested to allow the present Company Petition and pass an appropriate order of winding up of the respondent company.

3. In response to the notice issued by this Court, the respondent company has appeared and filed affidavit in reply. In the reply the debt is disputed. It is submitted in the reply that the company is doing business with the petitioner since 2002 and apart from the alleged transactions, there is no outstanding amount due and payable by the respondent company to the

petitioner. It is submitted that in fact, the respondent company has made regular payment to the petitioner for all these years for purchase of goods. It is further submitted that for the period of last two years the respondent company has purchased material from the petitioner to the tune of Rs.55 Lacs and has made the payments in time. It is further submitted and it is denied that 1300 kgs of tomato flakes was consumed by the respondent company without any complaint. It is further submitted that after receipt of the goods it was sent to the Quality Control Department of the respondent company wherein, by Test Report dated 24.4.2006 it was found that the said goods was not advisable for human consumption due to presence of pathological organism. It is submitted that as soon as the respondent company received the Laboratory Analysis Report, the Officer of the respondent company immediately informed orally / telephonically to the petitioner company and in reply, one Shri Arpit Singhal of the petitioner company categorically instructed the respondent

company to dispose of the said goods. It is submitted that since the purchase bill was credited in the ledger account the respondent company immediately sent a debit note for the equal amount of purchase bill. Thus, there was no question of any recovery of the outstanding amount for the subject goods. It is further submitted that the financial condition of the respondent company is very sound and they are one of the largest manufacturers and exporters of dehydrated spices and vegetables and there are more than 58 workmen engaged in the company. It is submitted that the respondent company is going concerned having annual turn over of Rs.1146 Lacs for the year 2005 – 2006. It is also further submitted that even for the year 2004-2005 and 2003-2004 also the respondent company was having annual turn over of Rs.930 Lacs and Rs. 743 Lacs respectively. Thus, it is submitted that the company is a going concerned and has not lost its financial substratum and therefore, it is requested to dismiss the present Company Petition.

4. Heard the learned advocates appearing on behalf of the respective parties.

5. It is the contention on behalf of the petitioner that a sum of Rs.1,10,500/- is due and payable by the respondent company and that they have given false reply to the statutory notice and that the respondent company has lost its financial substratum and is unable to pay the debts to its creditors. Against which the debt is disputed by the respondent company. It is also further submitted that as per the Laboratory Analysis Report the goods supplied by the petitioner company was not consumable. It is also the case on behalf of the respondent company that they are having business relations since 2002 and except the alleged debt of Rs.1,10,500/-, entire amount has been paid. It is also further submitted that for the period of last two years, the respondent company has purchased material from the petitioner to the tune of Rs. 55 Lacs and has made the payment in

time. On going through the affidavit in reply it appears that the debt is disputed. On going through the reply it also appears to the Court that the respondent company is a going concerned and has employed more than 58 workmen. That in the year 2005-2006 the annual turn over of the respondent company was of Rs.1146 Lacs which was in the year 2004-2005 of Rs.930 Lacs and in the year 2003-2004 of Rs.743 Lacs.

6. In the case of ***Pradeshya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical Ltd. And Another, [supra],*** the Supreme Court has held that, ***"A debt for the purpose of Section 433(e) of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date."*** In the said Judgment, the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court made in ***Madhusudan Gordhandas and Co.[1972] 42 Comp. Cases 125;***

"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chhoses not to pay that particular debt. (See A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D)). Where, however, there is no doubt that the company owes the creditor a

debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to

the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

"This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an

important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All ER 302; [1961] 31 Comp Cas 424 (CA).”

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.)[1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451 :

“It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmated as a scandalous abuse of the process of the court.”

7. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Mediqup Systems Pvt. Ltd. [supra],*** and the Hon'ble Supreme Court has observed that, *An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it.* It is further observed that, *A debt under this section must be a determined or definite sum of money payable immediately.* It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of ***Tata Iron & Steel Company Ltd. v. Micro Forge (India) Ltd., [supra]*** has laid down certain general principles in a case of winding-up proceedings and after considering various decisions of the Hon'ble Supreme Court, more particularly in the case of ***Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd. [supra]; Harinagar Sugar Mills v. Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation of U.P. vs. North India Petrochemicals Ltd. 1994***

(3) SCC 348, the judgment of the learned Single Judge of this Court in the case of ***American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841;*** and another decision of this Court in the case of ***Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.), 1998 (91) Comp.Cases 655,*** the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

8. Under the circumstances, when the debt itself is disputed the present Company Petition is not required to be entertained and/or admitted. Even otherwise, considering the last balance sheet and the affidavit in reply, it appears that the respondent company is a going concerned and therefore, it cannot be said that the respondent company has lost its financial substratum. Hence, this petition is dismissed.

[M.R.Shah, J.]

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